THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Arb.Case No.65 of 2004

Reserved on 21.03.2007

Date of decision 25.4.2007

Chief Engineer, Pathankot Zone
and anr. Petitioners

Versus

M/s Bharat Construction
and another. Respondents

Coram:
The Hon'ble Mr.Justice V.K.Ahuja,J.

Whether approved for reporting?[1] Yes.

For the Petitioners: Mr.Janesh Mahajan, Central Govt. Counsel.

For the Respondents: Mr.Sanjay Kakkar along with
Mr.Sanjay Gandhi, Advocate.

V. K.Ahuja, J.

This order shall dispose of the petition filed by the petitioners under Section 34 of the Arbitration and Conciliation Act,1996, hereinafter referred to as the 'Act' for setting aside the award dated 12.8.2004 passed by respondent no.2.

Briefly stated the facts of the case are that a contract for provision of Md Accn for or at Dharamshala under Contract Agreement (CA) was awarded in favour of contractor by Union of India. The said contract provided for an arbitration agreement in case there was dispute in between the parties. An Arbitrator was appointed on 31.1.2004 for adjudication of the claims who entered into reference on 17.2.2004 and passed the award on 12.8.2004 vide which the petitioners were directed to make payment of Rs.14,31,837.59 paise which included award amount of Rs.9,07,327.70 paise plus interest.

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[1] Whether reporter of local papers are allowed to see the judgment? yes

The petitioners have challenged the award on the following grounds, namely, firstly, that the arbitrator had wrongly awarded a sum of Rs.2,23,752/- against claim No.2. The arbitrator wrongly held that lintel bend was not required for framed structure since it was only required to be provided as strengthening measure for load bearing walls. The continuous lintel bend was included in the lump sum costs of the building and since the same was not provided at site a sum of Rs.2,23,752/- was correctly placed on the contractor which facts were not taken into consideration by the arbitrator who awarded the amount which was not legally and factually justified. Secondly, that claim No.3 was without any legal and facual basis and is liable to be quashed. It was not alleged as to what was claim No.3 and how it was awarded wrongly though a perusal of the award shows that the contractor had alleged that he was directed to provide soap niche in bathroom and WC of each quarter and a sum of Rs.9217.70 paise was awarded to him. Thirdly, that the arbitrator had wrongly considered claim No.4 and had concluded that the award is to be construed as per the drawings and the contractor had alleged that he had provided ferro cement shelves, pressed steel MS frames etc.etc. beyond the scope of contract agreement for which a sum of Rs.2,43,000/- was awarded in favour of the respondent No.1 as per the award. Lastly, that the arbitrator had awarded a sum of Rs.4,29,398/- in favour of the contractor under claim No.6 since the petitioners were to recover the sales tax deposited which had already been recovered from the contractor and the deduction of the sales tax paid was made by the Department wrongly. Another plea was taken that the arbitrator has awarded an interest at the rate of 10% which was wrongly granted and the same is higher than the prevailing rate of interest.

Reply to the objections were filed by respondent No.1 who denied the allegations.

A perusal of the record shows that no issues were framed by the court on the pleadings of the parties nor there is anything on record to

show that the prayer was made by the parties for placing documentary evidence on record. Therefore the arguments were heard on the basis of the objections filed and reply to those objections. Only the record of the arbitrator was summoned which was attached with the case file.

I have heard Mr.Janesh Mahajan, learned Central Government Counsel appearing for the petitioners and Mr.Sanjay Kakkar Advocate assisted by Mr.Sanjay Gandhi, Advocate, appearing for the respondents.

The submissions made by learned counsel for the petitioner-State were that the drawing were part and parcel of the agreement and according to agreement lintel bend was to be provided and the arbitrator had wrongly held that it was not part and parcel of the agreement. The arbitrator had also wrongly held that the extra work was done by the contractor/respondent No.1 since the work done under claim No.4 was part of the contract. In regard to the deductions made regarding sales tax it was submitted that it was for the contractor to apply for the refund and not for the petitioners and as such the arbitrator had wrongly held that the contractor was entitled to the refund of this amount. No other specific point was urged during the course of arguments, except that the term public policy has to be considered and the challenges made by the petitioners are to be considered to the award of the arbitrator which was against public policy.

On the other hand, the submissions made by learned counsel for the respondents were that scope of Section 34 of the Act as amended was very much limited since the earlier plea of misconduct also could be considered but now according to Section 34 of the Act the only ground which can be taken is that the award was against public policy which plea was never specifically taken by the petitioners that the award was against public policy or how it was against public policy. It was also submitted that the petitioners never alleged nor proved this fact and there is nothing on record to suggest how the award is against public policy. It was also submitted that since no case was made out for framing of issues, these

were not framed by the court and neither any prayer was made during hearing before me that the issues should be framed which arises from the pleadings of the parties. In the absence of such plea the plea raised in the petition and the reply made, are being considered.

It was further submitted by learned counsel for the respondents that there were no allegations that the arbitrator exceeded his jurisdiction or granted claims not preferred before him. It was also submitted that even if the arbitrator adjudicates on some points incorrectly the findings of the Arbitrator cannot be reconsidered by this court by reappraisal of evidence and as such those findings of the Arbitrator do not call for an interference by this court.

To substantiate his plea with regard to what the term public policy means, the learned counsel for the petitioners placed reliance upon the decision in **Sunil Kumar and another vs. Smt.Anguri Choudhari and another,** AIR NOC 105 which is not relevant since his Lordship was considering the question of secondary evidence.

Reliance was also placed upon decision in **H.P. State Electricity Board vs. R.J.Shah and Company,** (1999) 4 SCC 214 wherein it was held that if award is in excess of the jurisdiction of Arbitrator then it is liable to be set aside, but if award is within jurisdiction on the basis of the construction of the contract which the Arbitrator was required to do so, then the court cannot set it aside merely because another view was possible. It was held that test to de**termin**e whether Arbitrator acted in excess of jurisdiction or not. The court has to examine some documents including the contract and reference of the dispute to Arbitrator for the limited purpose of determining whether Arbitrator had jurisdiction or not. On facts it was held that the award was not in excess of jurisdiction of the Arbitrator.

Reliance was also placed upon decision of **Management and Computer Consultants and another vs. The Union of India and others**, AIR 2004 NOC 353(Cal.) wherein the provisions of section 34 of

the New Act were considered. The observations made are relevant and are being reproduced below:-

> "The arbitration Court cannot interfere with the award on the ground that the decision is erroneous if the award is otherwise proper. The award of the arbitrator is ordinarily final and conclusive. Wrong or right the decision of the learned arbitrator is final and binding, if it is reached fairly after giving adequate opportunities to the parties to place their grievances during the arbitral proceedings. It is not necessary for arbitration Court to examine the merits of the award with reference to the materials produced before the arbitrator. The arbitration Court cannot sit in appeal over the views of the arbitrator by re-examining and re-assessing the materials produced before the arbitrator. The factual determination of the arbitrator cannot again be re-appreciated. It is not open to the arbitration Court to re-appreciate reasonableness of reasons in the arbitral award."

On the other hand, the learned counsel for the respondents had placed reliance on the following decisions:

The decision in **Oil and Natural Gas Corporation Ltd. Vs. saw Pipes Ltd**., AIR 2003 SC 2629 shows that the provisions of Section 34 of the of the new Act were considered by the Hon'ble Apex Court. It was held that the expression 'public policy' does not admit the precise definition. Concept of public policy is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. It was held that phrase public policy has to be given wider meaning. Award could be set aside if it is contrary to the fundamental policy of Indian law, interest of India, justice or morality or is patently illegal.

The decision in **Rajsthan State Mines and Minerals Ltd. Vs. Eastern Engineering Enterprises and another**, (1999)9 SCC 283 shows that the provisions of Section 30 of the previous Act was considered by their Lordships and it was observed that in order to decide whether arbitrator has exceeded his jurisdiction, held, reference to the terms of the contract is a must. This observation was made when the arbitrator award could be challenged on the ground of misconduct.

Coming to pleas raised by the learned counsel for the petitioners, it is clear that there was not even a word mentioned that the award was against public policy or on what grounds it was against public policy. There are no submissions of the learned counsel for the petitioners that the arbitrator had considered the pleas or awarded amounts beyond the terms of agreement or beyond the reference made to him. To my mind all the questions raised are in regard to the different claims pertaining to the interpretation of the terms of agreement entered into in between the parties and on that basis the conclusions were drawn by the Arbitrator whether these amounts could be awarded or not. In regard to the first plea regarding claim No.2 pertaining to lintel bend whether it was to be provided or not, a perusal of the award made by the arbitrator shows that the Union of India had not agreed to contractor's contention that lintel bend was not specific and it was held that since the framed two storeyed structure was to be constructed, there was no need of lintel bend and it was only required to be provided as per the agreement as strengthening measure for load bearing walls. Therefore the amount was wrongly deducted by Union of India. In regard to the claim No.3 there were no allegations as to how it was justified. In regard to claim No.4 provision of shutter and ferro-cement shelves etc. it was observed by the Arbitrator that the ferro cement shelves, steel shutters etc.etc. were not considered in the unit price at pre-tender stage, which was an extra work done during the execution which requires to be paid and accordingly against the claim made of Rs.3,13,000/-, the Arbitrator allowed Rs.2,43,000/- in favour of the contractor. In regard to claim No.6 it was submitted by the contractor before the Arbitrator that the Union of India is not legally entitled to recover sales tax and the department/petitioner has asked the contractor to seek the refund of this amount. But the arbitrator concluded that the amount recovered by the Union of India as sales tax is reimbursable to the contractor.

I have made a reference to the terms of agreement and the pleas raised and the conclusions drawn by the arbitrator since it had to be considered by this court as to whether reference made to the arbitrator was within the four corners of the agreement or not or whether it was beyond the terms of agreement and the terms of agreement had to be considered by the Arbitrator who considered the same and gave reasoning also in favour of the claims awarded by him. It is not that the observations made by the Arbitrator were beyond the terms of the agreement and the findings on merit had to be given by the Arbitrator in regard to construction of the terms of agreement which opinion again cannot be drawn by this court based upon evidence. Thus from whichever angle the findings of the Arbitrator are considered these are based upon the interpretation of the terms of agreement and he had given reasons also in favour of the award made by him and it is not for this court to consider the evidence or the statements and give interpretation to the terms of agreement as it deemed proper in the facts of the case. The scope of Section 34 of the Act is very much limited and until and unless it is proved by the petitioners that their claims fall within the scope of Section 34 of the Act, the award made by the Arbitrator cannot be set aside. There is no merit in the petition filed by the petitioners which is accordingly dismissed with no order as to costs. The award made by the Arbitrator is made rule of the court accordingly.

April 25,2007(g) **(V.K.Ahuja),J.**